Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

ROGER ELLIOTT, *Petitioner*

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

ROGER ELLIOTT
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15 pp

QUESTION PRESENTED FOR REVIEW

Does intercircuit-conflict erode National and Homeland Security by warning America's military and federal service members that the discretion of federal judges includes affirming even the decisions of federal agencies that admit using false charges to oust a member for lawfully sounding the alarm?

Corporate Disclosure Statement

Petitioner Roger Elliott is not a corporate entity, and has no ties to a parent or publicly held company.

Opinions Below

The Merit Systems Protection Board's (MSPB) final order, at Appendix 1, is unreported. The U.S. District Court for the Eastern District of Virginia's order, at Appendix 2, granting the Federal Deposit Insurance Corporation's (FDIC) motion to dismiss, and for summary judgment, is unreported. The U.S. Court of Appeals for the Fourth Circuit's judgment affirming the District Court's judgment, at Appendix 3, is unreported, and the order denying petition for rehearing en banc is at Appendix 4.

Statement of Jurisdiction

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The court of appeals order was entered on October 17, 2001, and Elliott's petition for rehearing was denied November 27, 2001 (App. 4).

Statutes And Regulations Involved

5 U.S.C. § 2301(b)(4). All employees should maintain high standards of integrity, conduct, and concern for the public interest.

5 U.S.C. § 2301(b)(9). Employees should be protected against reprisal for the lawful disclosure of information which the employees reasonably believe evidences (A) violation of any law, rule, or regulation, or (B) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

5 U.S.C. § 7701(c)(2). Notwithstanding paragraph (1), the agency's decision may not be sustained under subsection (b) of this section if the employee or applicant for employment (A) shows harmful error in the application of the agency's procedures in arriving at such decision; (B) shows that the decision was based on any prohibited personnel practice described in section 2302(b) of this title; or (C) shows that the decision was not in accordance with law.

5 U.S.C. § 7703(c). In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence; except that in the case of discrimination brought under any section referred to in subsection (b)(2) of this section, the employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing court.

5 CFR § 1209.7(b). However, even where the appellant meets the burden stated in paragraph (a) of this section, the Board will not order corrective action if the agency shows by clear and convincing evidence that it would have threatened, proposed, taken, or not taken the same personnel action in the absence of the disclosure.

Statement Of The Case

The 1987 résumé by which Mr. Roger Elliott joined Mr. Donald Demitros' and Mr. Donald Abrell's staff, as Information Technology Specialist, GS-13, shows (1) a Commonwealth of Massachusetts finding that the Army Intelligence School fired him in 1986, for reporting his finding, as the Information Technology Security Officer, of systemic fear that to report security violations is career-suicide, and (2) a 1986 finding by Security Specialist Christine Wenrich:

> "Of utmost concern is that the majority of Security Division personnel interviewed expressed an attitude of frustration with the leadership personnel within the School, and especially within Security Division. They stated that proper security practices are not being strictly enforced by, and expected of, all ranks of personnel; and that the rules of the game change depending on who is involved and who may look bad. They further stated that they've addressed problems with the lack of security consciousness of people within the Security Division. They said that no action was taken on these matters and they were met with hostility and resistance. Several people interviewed said that they've developed a 'hands-off' attitude because these people are their raters and can adversely affect their careers. This attitude between Security Division's supervisors and subordinates is a serious security weakness not only for Security Division, but it also affects the entire School because of its relationship with Security Division."

The record of the 1999 action by which Demitros terminated Elliott's 25-years of federal service

shows that (1) the FDIC's Deputy Chairman and Equal Employment Opportunity chief reacted with a November 25, 1998, e-mail urging preemptive action by Demitros, regarding Elliott's e-mails on the costs and risks linked to post-retirement jobs with contractors, after lax oversight of contracts, and gender/age preferences; and that (2) six weeks later, Demitros banned Elliott, then five months later, fired Elliott with a decision emphasizing both threats and repeated-falsification.

The Merit Systems Protection Board rejected the charge-element, "repeated," by rejecting Demitros' claims about three of four allegedly-falsified items, but, contrary to precedent that (1) if one element fails, the entire charge fails (*Burroughs v. Dept. of Army*, 918 F.2d 170 (Fed. Cir. 1990)), and (2) a résumé's omission of previously disclosed history is not falsification (*Naekel v. Dept. of Transp.*, 782 F2d at 978 (Fed. Cir. 1986)), the MSPB and the courts upheld the repeated-falsification charge.

Thus, the MSPB and the courts ignored Demitros' testimony, "Well, I wasn't talking about threats, I was really talking about this - - this atmosphere of challenging everybody in his management chain" (MSPB transcript, page 115), and reasoned that:

- Elliott deceived Abrell with his 1991 résumé, by omitting the 1986 firing that is disclosed in the 1987 résumé by which Abrell and Demitros hired him.

- The Threats-element that Demitros emphasized in banning and firing Elliott need not be proven.

REASON FOR GRANTING THE PETITION

The mandate for vigilance and ethics in 5 U.S.C § 2301(b)(4) is also an invitation for federal employees to bet their careers on judicial vigilance and ethics.

After Mr. Donald Demitros banned Roger Elliott, he took the role of deciding official, fired Elliott, and, with no loss of credibility, admitted banning Elliott with a false charge, in retaliation for e-mails about mission-impediments (MSPB transcript at 115):

> "Well, I wasn't talking about threats, I was really talking about this - - this atmosphere of challenging everybody in his management chain".

Contrary to the intent in 5 U.S.C. §§ 7701(c)(2) and 7703(c) for lawful decisions, the U.S. Court of Appeals affirmed on the basis of U.S. District Court reasoning that is based more on the FDIC's harmful misstatement that Elliott largely concedes that the charges are true, than on the record.

The record shows that the FDIC violated 5 U.S.C. § 2301(b)(9), with reprisal against lawful disclosures, then failed in its burden of *clear and convincing* evidence, under 5 CFR § 1209.7(b).

Demitros' Inappropriate or Disrespectful Conduct charge fails, with no proof for the Threats element used to ban then remove Elliott from 25-years of federal service, but the Merit Systems Protection Board (MSPB) affirmed by ignoring precedent that:

(1) If all charge-elements are not proven the entire charge falls (*Burroughs v. Dept. of Army*, 918 F.2d 170 (Fed. Cir. 1990)).

(2) Threat-narratives require proof (*Huisman v. Dept. of Air Force*, 35 MSPR at 379 (1987) and *Greenough v. Dept. of Army*, 73 MSPR 648 (1997)), per criteria in *Metz v. Dept. of Treasury*, 780 F.2d 1001 (Fed. Cir. 1986).

Demitros' charge of Falsification of Official Federal Government Documents also fails, because:

(1) The MSPB rejected the "repeated" element by rejecting the FDIC's allegations regarding three of the four allegedly falsified items.

(2) No proof exists of any, much less repeated (*Creggett v. Dept. of Army*, 41 MSPR at 587 (1989)) supplying of incorrect information with intent to deceive (*Naekel v. Dept. of Transp.*, 782 F.2d at 978 (Fed. Cir. 1986)).

(3) Under *Naekel*, the omission of history shown on a previous résumé is not Falsification, since one cannot reasonably expect to hide facts comprising an Official Personnel File.

(4) Intent-to-deceive was not even alleged, except by the MSPB, contrary to MSPB rules against supplying charge-elements and evidence that the agency failed to provide.

(5) The MSPB may not use a chain of unproven propositions for proof (*Jacobs v. Dept. of Justice*, 35 F.3d 1543 (Fed. Cir. 1994)).

CONCLUSION

Review of intercircuit-conflict that can undermine National and Homeland Security, by encouraging reprisal against vigilance, is in the public interest.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ROGER ELLIOTT,
Appellant,

DOCKET NUMBER
DC-0752-99-0690-I-1

v.

DATE: AUG 18, 2000

FEDERAL DEPOSIT
INSURANCE CORPORATION,
Agency.

Richard L. Swick, Esquire, Washington, D.C., for the appellant.

Nestor D. Ramirez, Esquire, Washington, D.C., for the Agency.

BEFORE

Beth S. Slavet, Acting Chairman
Susanne T. Marshall, Member

FINAL ORDER

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. §1201.115).

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable evidence and that the administrative judge made no error in law or regulation that affects the outcome. 5 CFR § 1201.115(d). Therefore, we DENY the petition for review. The initial decision of the administrative judge is final. This is the Board's final decision in this matter. 5 CFR § 1201.113.

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FOR THE BOARD; "s/Robert E. Taylor"
Robert E. Taylor
Clerk of the Board

Washington, D.C.

Appendix 1b

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

ROGER ELLIOTT,
Plaintiff

v. Civil Action No. 00-1553-A

FEDERAL DEPOSIT INSURANCE CORPORATION,
Defendant.

ORDER

The matter came before the Court on defendant's motion to dismiss and for summary judgment, pursuant to Rules 12 and 56 Fed. R. Civ. P.

For the reasons stated from the Bench, defendant's motion is **GRANTED**.

Should plaintiff wish to appeal this Order he must do so within 60 days, pursuant to Rules 3 and 4, Fed. R. Civ. P.

The Clerk is directed to send a copy of this Order to plaintiff and all counsel of record and to place this matter among the ended causes.

"s/T.S. Ellis, III"
T.S. Ellis, III
United States District Judge

Alexandria, VA
May 11, 2001

Appendix 2

JUDGMENT

FILED:
October 17, 2001

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 01-1771
CA-00-1553-A

ROGER ELLIOTT,
Plaintiff - Appellant

v.

FEDERAL DEPOSIT
INSURANCE CORPORATION,
Defendant – Appellee

Appeal from the United States District Court for the Eastern District of Virginia at Alexandira

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In accordance with the written opinion of this Court filed this day, the Court affirms the judgment of the District Court.

"s/Patricia S. Connor"
Patricia S. Connor
CLERK

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 01-1771

ROGER ELLIOTT,
Plaintiff - Appellant

v.

FEDERAL DEPOSIT
INSURANCE CORPORATION,
Defendant – Appellee

Appeal from the United States District Court for the Eastern District Court of Virginia, at Alexandria. T.S. Ellis III, District Judge.

Submitted: October 3, 2001
Decided: October 17, 2001

Before NIEMEYER and TRAXLER, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

PER CURIAM:

Roger Elliott appeals the district court's order granting the Federal Deposit Insurance Corporation's motion to dismiss and for summary judgment as to Elliott's petition for review of the Merit Systems Protection Board's decision and on his claim of employment discrimination based on age, race, sex, and reprisal in violation of Title VII of the Civil Rights Act, 42 U.S.C.A. §§ 2000e to 2000e-17 (West 1994 & Supp. 2000). We have reviewed the record, the briefs, and the district court's opinion rendered from the bench and find no reversible error. Accordingly, we affirm on the reasoning of the district court. Elliott v. Federal Deposit Insurance Corp., No. CA-00-1553-A (E.D. Va. Filed May 11, 2001; entered May 17, 2001). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
November 27, 2001

No. 01-1771
CA-00-1553-A

ROGER ELLIOTT,
Plaintiff - Appellant

v.

FEDERAL DEPOSIT
INSURANCE CORPORATION,
Defendant – Appellee

On Petition for Rehearing En Banc

The appellant's petition for rehearing en banc was submitted to this Court. As no member of this Court requested a poll on the petition for rehearing en banc,

IT IS ORDERED that the petition for rehearing en banc is denied.

For the Court,

"s/Patricia S. Connor"
Patricia S. Connor
CLERK

Appendix 4